In this case the acquirer did not comply with what it was statutorily bound to do under s 21B(1) of the Act but had instead passed the whole amount of the purchase price to the receivers. The receivers had therefore received a sum part of which they ought not to have received. The Director-General of Inland Revenue was entitled to the sum of $105,461.84 being the amount of tax payable on the disposal of the landed property. As far as the tax is concerned the question of priority does not arise.

The appeal is accordingly dismissed. We make no order as to costs.

Appeal dismissed.

Solicitors: *Kassim Tadin Wai & Co.*

Reported by *Prof Ahmad Ibrahim*

Chinn Swee Onn v Puchong Realty Sdn Bhd

SUPREME COURT (KUALA LUMPUR) — CIVIL APPEAL NO 262 OF 1988
MOHAMED AZMI, HARUN HASHIM AND AJAIB SINGH SCJJ
23 SEPTEMBER 1989

Bankruptcy — Bankruptcy notice — Application to set aside — Judgment debt — Acceptance of performance from third party — Judgment cannot be enforced or executed — Bankruptcy notice and petition set aside — Contracts Act 1950, s 42

Contract — Judgment debt — Acceptance of performance by third party — Judgment cannot be enforced against debtor — Contracts Act, s 42

In this case, the respondents had obtained judgment by default of appearance against the appellant. Subsequently, the respondents had agreed to forbear to levy execution on the judgment and the respondents agreed to instruct a third party to pay the judgment debt by instalment of $2,000 a month. The respondents had received $10,000 from the third party. Nevertheless, they took out a bankruptcy notice against the appellant. The appellant applied to set aside the bankruptcy notice but this application was dismissed in the High Court and later, receiving and adjudication orders were made against the appellant. The appellant appealed.

Held, allowing the appeal:

(1) The respondents, having accepted the performance of the appellant's obligation to pay his debt by a third party, were precluded from enforcing the judgment against the appellant.

(2) In the circumstances, the respondents were not entitled to enforce the default judgment against the appellant. The consequential execution by way of bankruptcy notice and petition was bad and irregular. The bankruptcy notice and bankruptcy petition must therefore be set aside.

Cases referred to

2 *Haji Nik Ishak bin Haji Nik Daud* v *Nik Zainab bte Nik Jaafar* [1975] 2 MLJ 82 (folld)

2 *LYL Hooker Sdn Bhd* v *Tevanaigam Savisthri & Anor* [1987] 2 MLJ 52 (distd)

Legislation referred to

Contracts Act 1950 s 42

Appeal from: Bankruptcy No 42-215-87 (High Court, Ipoh)

Chan Kok Keong (*DKS Sambanthan (Miss)* with him) for the appellant.

John Fam for the respondents.

Cur Adv Vult

Ajaib Singh SCJ (delivering the judgment of the court): This was an appeal by Mr Chinn Swee Onn, a senior member of the Bar practising in Ipoh. He had applied to the High Court at Ipoh to set aside a bankruptcy notice dated 16 March 1987. The bankruptcy notice was based on a judgment obtained by the respondents — Puchong Realty Sdn Bhd — against the appellant by default of appearance in the sum of $82,392.50. With accumulated interest thereon and costs, this sum had increased to $136,114.29 when the bankruptcy notice was issued.

The appellant's application to set aside the bankruptcy notice came up for hearing before the learned judge on 14 June 1988. After hearing submissions from counsel for the parties the learned judge deferred his decision for a few days and on 21 June 1988 he dismissed the appellant's application to set aside the bankruptcy notice. Meanwhile the appellant had also been served with a bankruptcy petition dated 6 August 1987. After dismissing the appellant's application on 21 June 1988, the learned judge made receiving and adjudication orders against the appellant pursuant to the bankruptcy petition.

In his affidavit in support of his application to set aside the bankruptcy notice Mr Chinn Swee Onn states, inter alia, as follows:

> I crave leave to refer to the bankruptcy notice dated 16 March 1987 and the creditors petition dated 6 August 1987. The creditors have alleged in both these documents that I am indebted to them in the sum of $136,114.29. I deny that I am indebted to them in the said sum or any other sum.
>
> I further say that the creditors took judgment in default against me in Ipoh High Court Civil Suit No 344 of 1983 and Ipoh Sessions Court Civil Action No 701 of 1983 for a total of $102,392.50 on the mutual understanding and on the judgment creditors' undertaking that they will forbear to levy execution against me and in return I will instruct Hock Hin Leong Sdn Bhd of No 73 Jalan Leong Sin Nam, Ipoh to take over the judgment debt and forward to the judgment creditors the sum of $2,000 per month.
>
> Relying on their aforesaid agreement and undertaking of the judgment creditors, I then authorized Hock Hin Leong Sdn Bhd to forward to the creditors the said sum of $2,000 per month. A copy of my letter dated 27 May 1985 addressed to Hock Hin Leong Sdn Bhd is now shown to me and marked 'CSO-1'. Since then the judgment creditors have accepted payment from the said Hock Hin Leong Sdn Bhd but the total amount received by them is not known to me.

As the judgment creditors have agreed to accept the repayment of the debt from a third party they have lost all their rights of execution of the judgments against me and are therefore not entitled to enforce the judgments against me. If payment had not been made by Hock Hin Leong Sdn Bhd then they ought to sue the said company or execute the judgment against the said company.

The letter dated 27 May 1985 exhibited as 'CSO-1' in Mr Chinn Swee Onn's affidavit reads as follows:

Puchong Realty Sdn Bhd
1B1-A, 1st Floor
Raayat Building
Jalan Sultan Yusuf
Ipoh

In consideration of your forebearing to levy execution on the decretal amounts totalling $102,392.50 (ringgit one hundred and two thousand three hundred and ninety two and cents fifty) only in respect of judgments against me in Ipoh High Court Civil Suit No 344 of 1983 and in Ipoh Sessions Court No 701 of 1983 I do hereby instruct Messrs Hock Hin Leong Sdn Bhd of No 73 Jalan Leong Sin Nam, Ipoh to forward to you monthly commencing from May 1985 a sum of $2,000 (ringgit two thousand) only towards payment of the principal sums owing to you under the above two suits until the whole of the decretal sums shall have been settled.

Dated 27 May 1985.

Sgd
Chinn Swee Onn

We agree to the above and undertake to forward to Puchong Realty Sdn Bhd the sum of $2,000 monthly until the decretal amounts have been thus paid off.

Sgd
Hock Hin Leong Sdn Bhd
73 Jalan Leong Sin Nam
Ipoh

Two main grounds were advanced by the appellant before the learned judge as well as before us. First, that the sum of $136,114.29 as stated in the bankruptcy notice and bankruptcy petition was in excess of the actual amount owing by the appellant to the respondents and, secondly, that under s 42 of the Contracts Act 1950 the respondents were not entitled to enforce their claim against the appellant but should proceed against Hock Hin Leong Sdn Bhd, the third party who had agreed to pay the judgment debt to the respondents at the rate of $2,000 per month pursuant to the appellant's letter dated 27 May 1985. Section 42 of the Contracts Act 1950 reads as follows:

Effect of accepting performance from third person.

42 When a promisee accepts performance of the promise from a third person, he cannot afterwards enforce it against the promisor.

During the submissions made by the parties before the learned judge in Ipoh, counsel for the respondents conceded that the respondents had received $10,000 from Hock Hin Leong Sdn Bhd and before us on appeal it was conceded by counsel for the respondents that the respondents had in fact received a total of $12,000 from Hock Hin Leong Sdn Bhd pursuant to the agreement contained in the appellant's letter of 27 May 1985. By accepting these payments, the respondents had therefore impliedly accepted the arrangement for the payments to be made by Hock Hin Leong Sdn Bhd to the respondents in terms of the letter of the appellant dated 27 May 1985. Consequently, we are of the view that by virtue of s 42 of the Contracts Act 1950 the respondents are not entitled to enforce their claim against the appellant, which would mean that they would not be in a position to execute their judgment against the appellant including the bringing of bankruptcy proceedings.

In his grounds of judgment the learned judge states, inter alia, as follows:

The first issue to consider is whether exh 'CSO-1' is an assignment or a novation. In *LYL Hooker Sdn Bhd* v *Tevanaigam Savisthri d/o KT Chitty & Anor* [1987] 2 MLJ 52 the Supreme Court held that novation was a new contract which extinguished the rights and obligations under the old contract for which the new contract was made. Being a new contract, there must be consent of all parties and there must be consideration, and rights and obligations under it are not those transferred from the old contract which are already extinguished.

Exhibit 'CSO-1' cannot, in my view, be said to be a new contract between Hock Hin Leong Sdn Bhd and the judgment creditor which extinguished the rights and obligations of the old one btween the judgment debtor and the judgment creditor. There was no consideration as the judgment creditor made no agreement to forgo the judgment debt and in fact the judgment creditor was not even a party to it. We also do not have sight of how much has been paid by Hock Hin Leong Sdn Bhd to the judgment creditor except for exh 'CSO-3' which is only a proof of the sending but not the receiving. However, in his submission, counsel for the judgment creditor had conceded that $10,000 had been paid by Hock Hin Leong Sdn Bhd in 1985 but this was towards the judgment debt for Ipoh Sessions Court case 701/83, also against the judgment debtor. 'CSO-1' could therefore only be an assignment for which the judgment debtor would still be liable if Hock Hin Leong Sdn Bhd did not pay as promised. This situation clearly distinguishes itself from the facts of the case cited by counsel for the judgment debtor, namely, *Haji Nik Ishak bin Haji Nik Daud* v *Nik Zainab bte Nik Jaafar* [1975] 2 MLJ 82 where it was rightly held that since there had been an agreement to performance from a third party, the appellant could not enforce the payment from the respondent.

Exhibit 'CSO-3' referred to above is a letter from the appellant's solicitors to the respondents enclosing a cheque for $2,000 issued by Hock Hin Leong Sdn Bhd. This letter is undated but appears to have been received by the respondents on 21 January 1987 as indicated by a stamp mark — 'Puchong Realty Sdn Bhd 21 January 1987' — at the bottom of the letter.

In the case of *Haji Nik Ishak bin Haji Nik Daud* v *Nik Zainab bte Nik Jaafar*,[1] it was held by the Federal Court that 'as the appellant had agreed to accept performance of

the promise from the third person he could not under s 42 of the Contracts Act 1950 enforce it against the respondent'. The headnote in this case reads as follows:

> In this case the appellant had transferred his land to the respondent and the respondent had transferred her land to the appellant. The appellant's case was that the consideration for the transfer of his land was $25,000 and that for the respondent's land was $14,000, thereby leaving a balance of $11,000 which was agreed to be settled by (a) Nik Hassan $4,000 and (b) Nik Abdul Majid Yahya $7,000. Both Nik Hassan and Nik Abdul Majid were the sons of the respondent. Nik Abdul Majid did not settle the sum of $7,000 as agreed and the appellant thereupon claimed payment from the respondent. His claim was dismissed in the High Court and he appealed to the Federal Court.

In delivering the judgment of the Federal Court, Ali FJ said, inter alia, as follows:

> The effect of the said agreement, as it seems to me, is that upon the appellant's acceptance of Nik Abdul Majid's promise to pay or settle the amount $7,000 the respondent was discharged from liability to pay. The law here, in my view, is the same as in India. I am referring of course to s 42 of the Contracts (Malay States) Ordinance 1950 which is ... the same as s 41 of the Indian Contract Act. The commentary on the said provision in *Pollock and Mulla* (9th Ed) at p 361 seems to suggest that the law in England is different.

It is true that the respondents had obtained two judgments by default of appearance — one in the sessions court and one in the High Court — but the letter of 27 May 1985 refers to the total sum obtained by way of default of appearance in both the judgments in the sessions court as well as in the High Court so that s 42 of the Contracts Act 1950 applied to the total sum.

We are of the view that the learned judge failed to give due regard to s 42 of the Contracts Act 1950. The case of *LYL Hooker Sdn Bhd*[2] referred to by the learned judge dealt with the question of novation and assignment. In that case, s 42 of the Contracts Act 1950 was not in issue and hence was not considered by the High Court nor by the Federal Court. In the present appeal before us, counsel for the appellant relied strongly on s 42 of the Contracts Act 1950 and we agree with him that by virtue of the appellant's letter of 27 May 1985, the provisions of s 42 applied and therefore the respondents having accepted the performance of the appellant's obligation to pay his debt to them by a third party, namely, Hock Hin Leong Sdn Bhd, the respondents were precluded from enforcing the judgment debt against the appellant. The question of assignment and novation therefore did not arise in this case. In the circumstances, therefore, we held that the respondents were not entitled to enforce the default judgments against the appellant. The consequential execution by way of bankruptcy notice and bankruptcy petition was bad and irregular. We accordingly allowed the appeal with costs and set aside the bankruptcy notice and the bankruptcy petition.

On the view that we took in this appeal in relation to s 42 of the Contracts Act 1950 we did not find it necessary to consider the first point taken by the appellant that the sum mentioned in the bankruptcy notice and in the bankruptcy petition was in excess of the actual amount due.

Appeal allowed.

Solicitors: *Khong & Son; Lee Fam & Wong.*

Reported by *Prof Ahmad Ibrahim*

Nira Sdn Bhd v Malayan Banking Bhd

SUPREME COURT (KUALA LUMPUR) — CIVIL APPEAL NO 538 OF 1988
ABDUL HAMID LP, MOHAMED YUSOFF AND GUNN CHIT TUAN SCJJ
21 SEPTEMBER 1989

Land Law — Charge — Application for sale of charged land — Need to show default by chargor — National Land Code 1965, ss 256 & 257

In this case, the respondent had applied for an order for the sale of the lands charged by the appellant to them to satisfy the whole of the sum secured by the said charges which was due to the respondent. The manager of the respondent's main office had stated the total balance sums due to the respondent and had indicated that the monthly interest had been rightly calculated and no reply had been given by the appellant. Earlier, the respondent had demanded payment of the whole outstanding balance on the charges, and on failure to comply, the respondent had caused a statutory notice to be issued requiring the appellant to remedy the breach within a period of seven days from the date of receipt of service. The appellant received the notice but failed or neglected to remedy the said breach. On the evidence, the learned trial judge made the order that the lands be sold by public auction to satisfy the sums due to the respondent. The appellant appealed.

Held, dismissing the appeal:

On the evidence adduced, the respondent had, on its application, satisfied the court that the prior requirements of the law for an order for sale by the court have been complied with and that the default has been made by the appellant. The learned judge was therefore correct in making the order that the lands in question be sold by public auction under s 256 of the National Land Code 1965 to satisfy the sums due to the respondent.

Case referred to

1 *Chettiappah Chetty* v *Raja Abdul Rashid* (1931-32) FMSLR 345 (folld)

Legislation referred to

National Land Code 1965 ss 256, 257

Appeal from: Originating Summons No S5-31-1927-87 (High Court, Kuala Lumpur)

K Chandra for the appellant.
SM Yoong for the respondent.

Cur Adv Vult